49955

(63 I.A.2d 26)

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| DOMINIC NESCI, Plaintiff-Appellee, v. HENRY SENNHOLZ and OTIS JONES, Defendants-Appellants. | APPEAL FROM THE MUNICIPAL COURT OF CHICAGO, FIRST MUNICIPAL DISTRICT OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS. |

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

Defendants appeal from a judgment for $5,000.00 entered in favor of the plaintiff in a personal injury action. The plaintiff, Dominic Nesci, was self-employed as a gardener for about seventeen years, working only during the spring and summer months. He did this type of work about six months of the year. On May 21, 1957, at about 4:45 P.M. he was driving east on 95th Street in the inside lane. Upon approaching Damen Avenue the traffic lights were red and he came to a stop along side of a C.T.A. bus, which was standing and unloading passengers. While the plaintiff was stopped at the red light the truck owned by the defendant, Henry Sennholz, and driven by the defendant, Otis Jones, struck the right rear of plaintiff's vehicle. As a result of the impact the plaintiff's vehicle was pushed about thirty feet and plaintiff jerked his neck, hurt his back and hit his chest on the steering wheel. Plaintiff's testimony showed that he was under the care of Dr. Nathan Triefield and that he was away from his business from May 21, 1957 to June 15, 1957, and that during such period he employed one Ralph Iser at $90.00 per week for three weeks. Plaintiff testified that he lost six stops in 1957 but during his testimony he identified only one of the six customers. He also testified to losing three stops in 1958.

On January 12, 1962, the attorneys of record for the plaintiff wrote to one of the attorneys of record for the defendant,

Henry Sennholz, stating, among other things, that plaintiff's income loss was 9 days at $20.00 per day, total $180.00, and that plaintiff returned to work on June 4, 1957. During the trial defense counsel called trial counsel for plaintiff as a witness for the purpose of introducing this letter into evidence. The letter, in addition to the foregoing, contained a figure which the plaintiff would take in settlement of the case. The court refused to permit sections of the letter to be introduced, primarily on the basis that it was an offer of compromise and settlement, and for that reason inadmissible.

All of the points and arguments raised by the defendants in their brief relate to the damage aspect. The defendants, however, have made no point, nor have they argued, that the verdict of the jury is excessive.

The defendants raise five points in their brief. The first three points concern separate phases of the law on the question of the admission in evidence of a certain letter allegedly written by one of the members of the law firm representing the plaintiff. The fourth and fifth points are addressed to the medical aspects, loss of time and loss of customers. It is apparent that the entire theory of defendants' case is that errors were committed by the court bearing on the question of damages, but since no point has been made or argued in defendants' brief that the verdict is excessive, we come to the conclusion that all questions relative to damages have been waived.

In Gardner v. Railway Express Agency, Inc., 274 Ill. App. 626, the court held that, where a defendant contended that the court committed several errors that bear upon the question of damages, it was entirely unnecessary to consider those alleged

errors because defendant had not by any assignment of error raised the point that the amount of the verdict was excessive.

In Hedge v. Midwest Contractors Equipment Co., 58 Ill. App. 2d 365, the defendant contended that the plaintiff was contributorily negligent as a matter of law. The court there held that it was precluded from considering the jury's findings because the manifest weight question had not been raised or argued on appeal.

Supreme Court Rule 39 (Ill. Rev. Stat. 1963, chap. 110, par. 101.39) requires the appellant's brief to contain points and authorities which shall consist of the propositions relied upon in support of the appeal, and, further, that no point not contained in the brief shall be raised afterwards. This Supreme Court rule has been adopted by the Appellate Court of Illinois, First District, in its Rule 5.

No point was urged by the defendants on the question of their liability.

Since the defendants in their points and authorities urge error which would go only to the question of damages but have failed to raise the point that the verdict of the jury was excessive, we cannot under the Appellate Court Court rules further consider this matter.

Judgment affirmed.

Dempsey, P.J., and Schwartz, J., concur.

Abstract only.

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63 I.A.2 183

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

General No. 10635 / Agenda No. 5

Thomas D. Burton, Florence C. Fitzpatrick, Julian Van Sice and Famous Finance Co., a corporation,

Plaintiffs (Objectors)-Appellants

vs.

John L. Cain, as Treasurer of Sangamon County, Illinois and Ex-Officio Town Collector of Capital Township and not as an individual,

Defendant-Appellee

Appeal from Circuit Court Sangamon County

TRAPP, J.

Appellant taxpayers appeal from an order of the Circuit Court which denied a motion for leave to re-file their objections to real estate taxes for the year 1962 in Sangamon County. The same order granted a motion in behalf of the collector to strike the taxpayers' objections, found that the taxes under protest were not paid within the time allowed by law and ordered the collector to distribute the taxes paid and held in the Protest Fund to the taxing bodies entitled thereto.

Separate complaints were filed for the several taxpayers on December 31, 1963, alleging that on divers dates ranging from November 12, 1963, through January 9, 1963, (sic), such taxpayers paid the amount of taxes billed under protest "in order to avoid a forced sale of such real estate for non-payment of such real estate taxes", and alleging that the taxes billed were so improper and excessive as to constitute fraud.

On January 16, 1964, one of the judges of the circuit court entered an order granting leave to file taxpayers objections as being equitable. On January 21, 1964, the collector filed a motion to strike the objections upon the grounds, among others, that the taxes had been paid under protest after the filing of the delinquent tax list and the entry of judgments thereon. The motion filed in behalf of the collector further alleged that at the time of entering judgment for the delinquent taxes, the court had ordered that all objections to taxes paid under protest should be filed on or before December 6, 1963. This allegation is not controverted in the record. Petitioners' statement of facts sets out that the collector filed a delinquent tax list on October 25, 1963, and that judgment was entered on that date except as to taxes paid under protest.

On March 10, 1964, the matter was heard by another

judge of the circuit court who ordered the objection stricken as being filed upon leave granted ex parte and without notice. Taxpayers were granted leave to present a new motion for leave to file objections and such motion was filed on March 12, 1964.

A summary of the grounds in support of the motion for leave to file the objections included: (1) that the collector "...did not give to this Petitioner notice in any manner of the time of the filing of the delinquent tax list", (2) that the necessary investigation of the taxes in order to prepare the objection and the personal absences of the petitioners were major and unavoidable factors in the delay, (3) that the collector had adequate notice that the taxes were paid under protest when the payment was accepted on November 12, 1963. The same allegations were made as to each petitioner.

On August 5, 1963, the court made the finding and entered the order set out at the beginning of this opinion. On September 30, 1963, the court denied a motion for rehearing. At this time the parties stipulated that the court's memoranda of reasons for his ruling might be included in the record. It is in the following language:

> " The court only has discretion to grant leave to hear late filed tax objections where such objections are based on payment of taxes under solid (sic)

> protest. The payment of taxes after delinquent date and after judgment cannot be under a valid protest. The invalidity of the protest is a complete bar to hearing any objection."

The several steps essential to making objections to real estate taxes levied are set forth in Chap. 120, Ill. Rev. Stat. (1961). The taxes become delinquent as provided for in §705. Payment under protest is made pursuant to §675, which also requires that the objector appear at the next application for judgment and make objections to the taxes paid under protest. Under §716, the objector must present a receipt showing payment of at least 75 per cent of the taxes to which objections have been made.

Notice of the application to be made by the collector for judgment upon delinquent taxes is provided in §706, i.e., by newspaper publication at least ten days prior to such application. This section specifically provides that such public advertisement shall be sufficient notice of application for judgment and sale. The apparent contention of the taxpayers that they shall have personal notice of the action of the collector, or some form of notice other than that provided by such publication, is without support in the statute.

While §710 of the chapter provides that the application for judgment shall be filed during the month of

September, it also provides that, if for any cause, there is delay and the collector is prevented from advertising in that month, it shall be legal to obtain judgment for such taxes any time thereafter, and that failure to make such application for judgment during the month of September is not a valid objection to the rendition of a judgment.

The Supreme Court has clearly interpreted the statutory procedure to mean that payment of the taxes and the filing of a protest are mandatory to enable the collector to omit the property from the delinquent tax list upon which judgments are obtained. The People ex rel Claude Anderson, County Collector v. Chicago & Eastern Illinois Railroad Company, 399 Ill. 520 at p. 526; 78 N. E.2d 265. It is apparent upon the pleadings and argument of the petitioners that their respective parcels of real estate were upon the delinquent tax list and judgment was entered thereon by reason of the failure to comply with the statute.

The exercise of the discretion of the court to permit the filing of tax objections is limited to those instances where the objections have been filed by the authority of the court granted prior to the entry of judgment for taxes. Nugent v. Toman, 372 Ill. 170; 23 N. E.2d 43. This rule was reiterated by the Supreme Court in The

People ex rel John L. Cain, County Collector v. Illinois Central Railroad Company, Supreme Court No. 39218, an opinion adopted on September 28, 1965. There the taxes had been paid in full under protest. At the time of the entry of judgment for delinquent taxes, the court ordered that objections to the taxes should be filed on or before December 6, 1963. This seems to be the identical order alleged by the collector in his motion to strike. Such order fixing the time for the filing of tax objections was entered as a part of the order for judgment against the real estate on the delinquent tax list. The Supreme Court held that such order fixing the time for filing objections was valid where filed prior to the time of entry of judgment against the property, citing Nugent v. Toman.

The dominant and controlling facts in this case seemed to be that the petitioners took no steps regarding their respective taxes until judgment had been entered against them. Under the interpretation of the statute adopted by the Supreme Court, the lower court had no discretion to authorize the filing of objections after judgment had been entered against the petitioners.

Petitioners urge that necessary investigation to prepare the objections and their several personal absences excused the delay in filing the objections. Delay for the

suggested reasons has no apparent relation to the essential requirements that the tax be paid under protest prior to the time of the entry of judgment for the delinquent taxes. As a matter of fact, it would appear to be clear that the petitioners were aware that their taxes were unpaid and had had a period of time extending over several months from the date of the issuance of the tax statement to investigate the problems incident to filing the tax objections.

A contention of petitioners is that after the entry of the several judgments, the collector accepted the payments paid under protest and that he should be estopped to oppose the motions of the petitioners. It seems axiomatic, however, that the administrative act of the collector is not binding upon the court, and again, judgment having been entered against the taxpayers, the acceptance of the tax payments by the collector was not an act upon which petitioners relied to their detriment, a usual element in estoppel.

The judgment of the circuit court is affirmed.

SMITH, P.J. and CRAVEN, J., concur.

> protest. The payment of taxes after delinquent date and after judgment cannot be under a valid protest. The invalidity of the protest is a complete bar to hearing any objection."

The several steps essential to making objections to real estate taxes levied are set forth in Chap. 120, Ill. Rev. Stat. (1961). The taxes become delinquent as provided for in Sec. 705. Payment under protest is made pursuant to Sec. 675, which also requires that the objector appear at the next application for judgment and make objections to the taxes paid under protest. Under Sec. 716, the objector must present a receipt showing payment of the taxes to which objections have been made.

Notice of the application to be made by the collector for judgment upon delinquent taxes is provided in Sec. 706, i.e., by newspaper publication at least ten days prior to such application. This section specifically provides that such public advertisement shall be sufficient notice of application for judgment and sale. The apparent contention of the taxpayers that they shall have personal notice of the action of the collector, or some form of notice other than that provided by such publication, is without support in the statute.

While Sec. 710 of the chapter provides that the application for judgment shall be filed during the month of

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT
SPRINGFIELD 62701

ROBERT L. CONN, CLERK
TELEPHONE
AREA CODE 217
525-2586

November 1, 1965

Callaghan & Company
6141 North Cicero Avenue
Chicago 46, Illinois

Attention: Editorial Department

Gentlemen:

Our attention has been called to the fact that in the opinion in re Burton, et al vs. Cain, etc, General No. 10635, sent to you on October 27, 1965, there are certain errors to be corrected.

Accordingly, we are enclosing herewith a new page 4 on which the words "at least 75 per cent of" have been deleted in line 9 of the first paragraph appearing on said page, and ask that you substitute the new page for the one previously received.

On page 5 of the opinion we ask that you substitute the word "October" for the word "September" in lines 1 and 5.

Thank you for your early attention to this matter.

Very truly yours,

Robert L. Conn.

Clerk, Appellate Court
Fourth District

RLC:iv

49783

63 I. App. 2444

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,

vs.

MILLARD WHITLEY,
Defendant-Appellant.

APPEAL FROM
CRIMINAL DIVISION
CIRCUIT COURT
COOK COUNTY

MR. PRESIDING JUSTICE McCORMICK DELIVERED THE OPINION OF THE COURT

The Criminal Division of the Circuit Court of Cook County, in a bench trial, found the defendant, Millard Whitley, guilty of the crime of indecent liberties with a child. The court sentenced the defendant to the Illinois State Penitentiary for a term of not less than ten nor more than twelve years, and denied his written motion for a new trial. This appeal is taken from the findings and judgment of that court. The only objection raised by the defendant is that he was not proved guilty beyond a reasonable doubt.

The witnesses revealed a sordid story to the trial court. Briefly, the facts developed at the trial were that the defendant, a 46-year old man, had intercourse with an 11-year old girl.

Janet Miller, the complaining witness, testified to the following: She and Geraldine Williams, aged 13, and their respective younger brothers and sisters, were alone at Janet's apartment on the date of the crime. Mrs. Miller had left the house at 10:00 a.m. to go to church. About 1:00 p.m. the defendant came to the Miller apartment and asked for Mrs. Miller, because he wanted her to iron a pair of pants for him. Upon learning that she was not at home he asked Janet if she would iron the pants for him. When she said she would not, he left. About an hour later he came back and again asked for Mrs. Miller. He then asked Geraldine if she would iron his pants. He offered to pay her 25 cents. Geraldine started to iron the pants, but Janet told her not to. Janet took the pants off the ironing board and threw them on the floor. The defendant then gave Janet a quarter which he later took back, telling her to

come with Geraldine to his house to get the quarter. They went to his apartment and the defendant then said one of the girls should take the quarter and get some candy. Janet said she would go but the defendant said that she should stay there, and he gave the quarter to Geraldine. After Geraldine had closed the door behind her the defendant went back to another room, then returned to the front and threw Janet across a bed where the defendant's girl friend used to sleep. He pulled down Janet's pants and had sexual intercourse with her. As Geraldine came in she saw Janet pulling up her pants. Geraldine had a bag of candy with her. The girls then left the apartment. When they were outside Geraldine asked Janet what had happened and Janet told her. Janet testified that when she was at the defendant's apartment on previous occasions the defendant's girl friend was there also, but that the defendant had not on other occasions given Janet a quarter.

Janet testified that she was standing in the washroom with her pants still around her ankles when her girl friend returned. However, Janet also testified that in a statement made to the police two days after the crime she had said that Geraldine, upon reentering the apartment, saw her pulling up her pants in the bedroom. Janet further testified on the stand that the statement to the police was a true statement. Although she testified on the stand that she had gone directly home from the defendant's apartment, she admitted that in her statement to the police she had said that she and Geraldine went home after going to a store and buying some candy.

Geraldine's testimony revealed substantially the same story as Janet's. After the girls arrived at the defendant's apartment he gave Geraldine a quarter and she left to buy some candy. When she got back the door was open and she could see Janet in the bedroom pulling up her pants. On cross-examination Geraldine stated

that Janet's pants were on the floor; that she and Janet, after leaving the defendant's apartment, did not go to the store for candy but that they went to Geraldine's apartment which was located right next to the Miller apartment. She indicated at several points in her testimony that she had no knowledge of Janet having had $5.00 or any money on her when they left the defendant.

Daisy Miller, the mother of Janet, testified that she came home at about 2:45 p.m., and that from the time she returned she knew where her daughter was. Geraldine's younger sister, Ginny, told Mrs. Miller that Janet had accused the defendant. Mrs. Miller went to find the defendant, brought him to her apartment at about 4:00 p.m., and asked him if he had been in her house. He said he had and that he had come over to get a pair of pants pressed. He denied that he had done anything to Janet and told Mrs. Miller that the girls had taken $5.00 from him. Mrs. Miller testified that she had taken Janet to the Provident Hospital, had returned home at about 5:00 or 5:15, and that later that same evening they went to the Cook County Hospital where Janet was examined. It was stipulated that the hospital records indicated that the examining doctor found that there were superficial abrasions on the lateral wall of the vagina and that motile sperm were found therein. The discharge diagnosis was that there was a possible rape. Mrs. Miller told the court that she had known the defendant for six years prior to the date of the crime, but had never gone out socially with him or dated him; that occasionally the girl with whom the defendant was living at the time would baby-sit for her at the Miller apartment, and that sometimes the defendant accompanied her.

The defendant testified in his own behalf. His testimony set forth the following: He knew Daisy Miller, the mother of the complaining witness. She had roomed with him at one time. During the time she was not rooming with him he used to cook for her and help

her when she was sick. He knew Janet; her mother had sent her on errands to his apartment many times. On the day of the incident in question he went to the Miller home to get Daisy Miller to press a pair of pants for him. On previous occasions she had ironed his clothes--shirts and other articles of apparel. He arrived at the Miller apartment at 12 o'clock, and asked for Mrs. Miller. Janet said that her mother was at church and that she, Janet, would press the pants. Another little girl [Geraldine] was with Janet. The defendant told Janet that he was afraid to have her press the pants, however, Geraldine said she would do it if he would give her a quarter. He gave her the quarter and she started to press the pants, but did not finish them because of an ensuing altercation between him and Janet. He said, "Janet had taken $5.00 from me and I was trying to make her give me back my $5.00."

The defendant then testified that Janet had taken the $5.00 at his own apartment. He further stated that he did not come back to the Miller apartment, but that the two girls came to his apartment where Janet said she wanted money to get some candy. He stated that he gave Geraldine a quarter to get candy; that she had come back from the store when he saw Janet put her hand into the pocket of his pants which were hanging on the chair next to his bed. Although he had earlier testified that his eyesight was poor, he now testified that he saw her take $5.00 out of the pocket. The two girls then ran out and he chased after them up to the Miller apartment. At that time he asked Janet for his money, and said he was going to tell her mother. She replied that if he didn't go away she would call the police. The girls ran out of there, over to a friend's apartment across the hall.

Although the defendant had already testified that he had originally intended to visit his children ". . . who live on the west side. . . because I had promised them I would be over to see them . . . ," he at this point testified that he went from the scene

with the girls to his own apartment, then to a friend's house [illegible] the block--arriving there about 2:00 p.m.--and played cards. He stated that Mrs. Miller came there about 5:30 or 6:00 p.m., and left with her. They stopped at his place for refreshment and a drink, but Mrs. Miller did not participate. They then went to the Miller apartment where Mrs. Miller repeated what Geraldine's sister had said. He denied the charge and went back to his own house. On cross-examination he said that as far as he knew, Janet "was a nice little girl." At no time during his testimony did the defendant state he had told Mrs. Miller that Janet had taken money from him. The defendant told the court that he had six children. The woman with whom he had been living told the court that he had supported her and the children for eleven years.

The defendant put on two character witnesses. One was his illegitimate daughter, Gwendolyn Richardson, who testified that she lived at 3400 West Franklin Boulevard; that she was 14 years old; that she visited the defendant frequently at his house; and that he had a reputation in the community in which he lived as a "law abiding man." The other witness, Lorraine Richardson, who was 17 years old, testified that she lived at the same address as Gwendolyn, and that the defendant was her "step-father." Her testimony with reference to the character of the defendant was to the same general effect as that of Gwendolyn.

The court, after argument and discussion with the Assistant State's Attorney and the defendant's attorney, found the defendant guilty of the crime of indecent liberties under section 11-4 of the Criminal Code (Ill.Rev.Stat. 1963, ch.38, § 11-4), and sentenced him to the Illinois State Penitentiary for a period of ten to twelve years. This section provides:

> "(a) Any person of the age of 17 years and upwards who performs or submits to any of the following acts with a child under the age of 16 commits indecent liberties with a child:
>
> (1) Any act of sexual intercourse;
>
> * * *
>
> "A person convicted of indecent liberties with a child shall be imprisoned in the penitentiary from one to 20 years."

In this court the defendant argues that there are inconsistencies in the testimony of Janet and Geraldine. It is true that there are some slight inconsistencies in their testimony, however it is equally true that the testimony of the defendant is also inconsistent. The testimony of Janet is direct and consistent with reference to the criminal act committed upon her person by the defendant. The stipulated medical evidence furnishes strong corroboration. The minor inconsistencies are with reference to the place in the apartment where she was at the time she was putting on her pants, and the question as to whether the door to the apartment was open or closed after Geraldine left. The defendant's testimony is not consistent with reference to the time and place where the alleged theft of the $5.00 occurred.

It should be noted that both Janet and Geraldine testified that the defendant gave a quarter to Janet at Janet's home, then took it back and left, and that he told her to come to his house to get it. Both Janet and Geraldine testified that when they went to the defendant's house he gave the quarter to Geraldine and told her to go out and get some candy. This testimony is corroborated by the defendant himself. It is also worthy of note that the defendant at no time testified that he complained to Mrs. Miller that Janet had taken $5.00 from him. Mrs. Miller testified that after she brought the defendant back to her apartment to tell him about the accusation made by her daughter, he said that the girls had taken $5.00 from him.

The defendant cites People v. Williams, 414 Ill. 414, 111 N.E. 2d 343, and People v. Nunes, 30 Ill.2d 143, 195 N.E.2d 706, to support the proposition that the charge of rape or indecent liberties is easily made, hard to prove, and still harder to defend against by one ever so innocent. In neither of those cases was there significant evidence present in the instant case, for in both of the cited cases the complaining witness merely charged the defendant with the crime; there were no sperm tests; there was either no corroborating testimony or substantially weak corroborating testimony. In the present case the hospital report confirmed that the complaining witness had had intercourse. Shortly after the incident the complaining witness told her friend's younger sister, Ginny, what had happened, and Ginny reported the story to Mrs. Miller. The prosecution witnesses were substantially in agreement as to the relevant facts of the crime. The testimony of the defendant is internally inconsistent.

The trial judge had the opportunity to observe the witnesses testifying before him, and stated that in his opinion, Janet was a very intelligent young girl for her age; that her testimony was clear and sufficiently corroborated. In the trial of a lawsuit where there is conflicting evidence, it is necessary for the trier of the fact to believe one side or the other, and the rule is clear that "In a bench trial of a criminal case the trial court's judgment based upon the credibility of the witnesses will not be disturbed unless it is based on clearly unsatisfactory and improbable evidence." People v. Johnson, 47 Ill. App.2d 441, 198 N.E.2d 173; People v. Clark, 30 Ill.2d 216, 195 N.E.2d 631.

In People v. Sharp, 384 Ill.503, 51 N.E.2d 554, a case where the defendant was convicted of taking indecent liberties with a

child, the court pointed out that the e[illegible]
was corroborated, and the court further [illegible]

> "The testimony of the three [illegible]
> on direct examination is amply sufficient to
> sustain the conviction. It is contended, how-
> ever, that the cross-examination of these wit-
> nesses shows so much confusion and contradiction
> that their testimony becomes wholly incredible as
> evidence to prove the charge beyond a reasonable
> doubt.
> * * *
> "The testimony of the children as to the details
> of what took place is not exactly the same, and in
> this respect strengthens rather than weakens their
> testimony, because impressions created by fright
> and surprise are not imprinted upon witnesses
> alike. . . ."

The court held that the alleged crime was proved beyond a reason-
able doubt.

In the instant case, it is the opinion of this court that the
evidence is sufficient to remove all reasonable doubt of the defend-
ant's guilt. The judgment of the Criminal Division of the Circuit
Court of Cook County is affirmed.

AFFIRMED

DRUCKER, J., and ENGLISH, J., concur.
Publish abstract only

49861

(63 I.A.2449)

A

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,
v.
LUIS ROSARIO RIVERA,
Defendant-Appellant.

APPEAL FROM
CIRCUIT COURT
COOK COUNTY

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT:

Defendant was convicted at a bench trial of voluntary manslaughter and sentenced to one to ten years in the penitentiary. He appeals from the judgment.

About 4:00 A.M. on October 12, 1963, Sam Adelphia, Gerald Carrao and Joseph Maranto were seated in a small restaurant on Chicago's near north-west side. Angelo Christopha and Joseph Panzo, friends of Adelphia, entered the restaurant and sat down at the service counter. Shortly thereafter, defendant Luis Rivera, Luis Diaz Melendez and Antonio Rivera entered and took seats immediately next to Adelphia and his companions. An argument ensued between Adelphia and Melendez, which was quickly stopped by defendant and Carrao. A short while later a violent fist fight broke out between Adelphia and his companions on the one side, and defendant and his companions on the other. The evidence is conflicting as to whether Christopha and Panzo joined into the fight.

During the course of the altercation several shots were fired by defendant from a pistol which he had in his possession upon entering the restaurant, the bullets striking Adelphia in the back and in the head. The coroner's report showed that the bullets entered Adelphia's body from the rear, traveling in a downward path; death was caused by the bullet which entered the head.

Defendant testified that he was lying on the floor when he fired the shots, that he fired into the air and that at the time no one was near him. Defendant claimed he fired the pistol to frighten off his attackers, who were hitting him with their fists, sugar bowls and sticks, and biting and kicking him, all of which acts were admitted by Adelphia's

companions, [illegible] Maranto. Both Carrao and Maranto testified, however, that defendant had Adelphia in a headlock, and that both Adelphia and defendant were standing when the shots were fired. The witness [illegible] attempted to warn Adelphia that defendant had put [illegible] just before the shots were fired.

Luis Melendez and Antonio Rivera were indicted with defendant for the murder of Adelphia. The State elected to try defendant Luis Melendez first, and at the time of his trial the charges against Melendez and Antonio Rivera were still pending. At the close of the State's case in chief, defense counsel sought to call Melendez and Antonio Rivera as witnesses for the defense. Counsel for Melendez and Antonio Rivera informed the Court that the two men would take the stand but would answer only as to their respective names and addresses. It appears that neither Melendez nor Antonio Rivera could speak English, and an interpreter was employed for the purpose of translating their testimony.

Melendez took the stand and testified to his name and address. [illegible] directed the witness' attention to the early morning hours of [illegible], 1963, and asked if the witness had occasion to see Adelphia Rivera, the witness' counsel interrupted the questioning and advised him of his right to refuse to answer any questions which might tend to incriminate him. Melendez thereupon refused to answer the question on the ground of self-incrimination, and was excused as a witness.

Antonio Rivera was then called and likewise testified as to his name and address. Defense counsel again sought to inquire into the witness' connection with the defendant on the night in question, and the witness' counsel again interrupted. After Antonio Rivera was advised as to his constitutional rights, he refused to answer the question. Defense counsel asked him why he refused to answer the question, whereupon the Court interrupted and said, "Well, we'll say that by reason of his

limitation--you have talked to your lawyer?. . . All right. Under the 5th Amendment." Antonio Rivera was then excused as a witness.

The indictment charged the crime of murder. There was a finding of not guilty on the murder charge, and a finding of guilty on the lesser included charge of voluntary manslaughter. The trial judge based the finding of guilty primarily upon the evidence that the bullets entered Adelphia's body and moved in a downward manner, leading the Court to conclude that defendant could not have been lying on the floor and shooting into the air as he had testified. The Court thereafter entertained and allowed the State's motion to nolle prosequi the indictments against Melendez and Antonio Rivera.

Defendant maintains that the trial judge claimed the privilege against self-incrimination for the witness Antonio Rivera which was error for the reason that the privilege is a personal one and can be claimed only by the witness himself; that the trial judge erred in failing to compel Melendez and Antonio Rivera to become witnesses for the defendant; and that the State deprived defendant of his right to the testimony of competent eye-witnesses, Melendez and Antonio Rivera, by joining them as co-defendants when it clearly appeared they were not guilty of the crime charged.

As to defendant's first contention, it does not appear that the Court claimed the privilege against self-incrimination for Antonio Rivera. After defense counsel objected to the witness' counsel advising the witness, while on the stand, of his constitutional rights, the Court stated, "Now, he may advise him and then it is up to the witness." After some discussion, the witness stated that he refused to answer the question. When defense counsel asked the witness why he refused to answer the question, the Court interposed and asked the witness if he had talked to his lawyer, remarked about the witness' language impediment and concluded that his refusal was based upon the Fifth Amendment. The witness himself claimed the privilege, and the fact that he did not use

legal language for the purpose is immaterial, since no special form of wording is necessary. See Quinn v. United States, 349 U.S. 155, 162.

The cases cited by defendant in support of this position are not in point, for the reason that in those cases the Court itself interposed objections to questions asked of witnesses who had either declined representation by counsel at trial or who had stated they had no particular reason for not answering the questions propounded, or the court itself claimed the privilege for the witness before the witness had an opportunity to speak. See Eggers v. Fox, 177 Ill. 185; United States v. Ginsburg, 96 F.2d 882; Looney v. People, 81 Ill. App. 370. In the case at bar the privilege against self-incrimination was claimed by Melendez and Antonio Rivera themselves.

We turn to defendant's contention that the court should have compelled Melendez and Antonio Rivera to become witnesses on behalf of defendant. The two men took the stand as witnesses, and answered to their respective names and addresses, as defense counsel was informed they would do before they were called. It was only when defense counsel sought to question them with respect to their association with defendant on the night in question that they refused to answer, which was their right since they were still under indictment on the same charge as defendant. Perhaps defendant's strongest case in support of this position is McElwain v. Commonwealth, 146 Ky. 104. While it is held in McElwain that a co-defendant is a competent witness at the separate trial of his co-defendant, it is nevertheless held that he cannot be compelled to give testimony which will tend to incriminate him; the Court there further stated that it was for the witness himself to determine what constituted self-incriminating testimony.

Finally, defendant maintains that the State attempted to intimidate Melendez and Antonio Rivera into refusing to testify on behalf of defendant, by joining them as defendants on the same charge where it clearly appeared they were not guilty of murder. This is not substantiated

by the record. While it does appear that only defendant was initially indicted for the murder of Adelphia, the grand jury returned a true bill against all three men in November of 1963. On the facts the grand jury could reasonably have believed the three men were acting in concert, since all three participated in the fist fight and since neither Melendez nor Antonio Rivera attempted to aid Adelphia or to disavow the act of the defendant, but rather fled from the scene. See People v. Kolep, 29 Ill.2d 116; People v. Cole, 30 Ill.2d 375, 379. The case of Thompson v. People, 410 Ill. 256, cited by defendant in support of this position is inapposite, for the reason that in Thompson it affirmatively appeared that the sheriff and the State's Attorney threatened prospective witnesses, and that these witnesses did not testify because of the threats. Here, no such situation presents itself; on the contrary, the circumstances indicate that the indictment of Melendez and Antonio Rivera as co-defendants with defendant Luis Rivera was entirely proper.

For these reasons the judgment is affirmed.

JUDGMENT AFFIRMED.

BRYANT, J., and LYONS, J., concur.